No. 80-193

In the
Supreme Court of the United States
October Term 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE GENERAL MOTORS CORPORATION,

Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE and BRIEF OF AMICI CURIAE MERL D. STONG, CATHERINE BEHR, as Personal Representative of the Estate of Herbert Behr, Deceased, PAUL DE HATE, BURNELL CLOUGH, FRANK E. DOUMONT and ROBERT MILANOVICH

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Now come Merl D. Stong; Catherine Behr, as Personal Representative of the Estate of Herbert Behr, Deceased; Paul De Hate; Burnell Clough; Frank E. Doumont and Robert Milanovich on behalf of themselves and others similarly situated, and hereby move the court, pursuant to Rule 36 of the United States Supreme Court Rules, for leave to file the accompanying brief *amici curiae*. In support of said motion, the above named individuals on behalf of themselves and all others similarly situated, show unto the court:

1. Merl D. Stong and Catherine Behr, as Personal Representative of the Estate of Herbert Behr, Deceased, are participants and/or beneficiaries of the Bucyrus Hourly Employees' Pension Plan and named plaintiffs and class representatives in a class action commenced in the United

States District Court for the Eastern District of Wisconsin, now pending before the United States Court of Appeals for the Seventh Circuit, Case No. 80-1755.

2. Paul De Hate and Burnell Clough are participants and/or beneficiaries of the Pension Plan for Employees Of Consumers Power Company, and named plaintiffs and class representatives in a class action commenced in the Eastern District of Michigan, currently on appeal in the United States Court of Appeals for the Sixth Circuit, Case No. 78-1402.

3. Frank E. Doumont and Robert Milanovich are participants and/or beneficiaries of employer sponsored pension plans and named plaintiffs and class representatives in separate class actions commenced in the United States District Court for the Western District of Pennsylvania, currently on appeal in the United States Court of Appeals for the Third Circuit, Case No. 80-1857.

4. The pension plans in which each of the above individuals is a participant and/or beneficiary provide for the offset of worker's compensation benefits against vested pension benefits. Because of the worker's compensation offset provision contained in the plan, each of the above named individuals and the members of the classes they represent have suffered, and will suffer substantial and even total losses of their vested pension benefits.

5. Each of the actions commenced by the above named individuals on behalf of themselves and others similarly situated allege that the offset of worker's compensation benefits violates various provisions of ERISA. Specifically, it is alleged in each of these pending class actions that the non-forfeitable vested rights provisions (Section 203(a) and Section 2(19) of ERISA, 29 USC §1053 (a) and §1002(19)), the exclusive benefit provision (Section 403(c)(1) of ERISA, 29 USC §1103 (c)(1)) and non-alienation provision (206(d)(1) of ERISA, 29 USC §1056(d)(1)) of ERISA are violated by the application of the plan provisions contained in the various pension plans providing for the offset of vested pension benefits by worker's compensation benefits.

6. In *Stong v. Bucyrus-Erie,* 472 F. Supp. 1088 (ED. Wis. 1979), recon. denied, 481 F.Supp. 760 (ED. Wis. 1979), the

court declared Section 3.11 of the defendant's plan to be in violation of the prohibition against the forfeiture of vested pension benefits found in Section 203(a) and Section 2(19) of ERISA. The court did not decide whether other provisions of ERISA had been violated as alleged in the complaint. Likewise, in *Utility Workers Union v. Consumers Power Company,* 453 F.Supp. 447 (ED. Mich. 1978) the District Court declared Section V-1 of the defendant's plan in violation of Section 203(a) and 2(19) of ERISA. The District Court did not pass upon the alleged violations of the other provisions of ERISA as alleged in the complaint therein. In *Frank E. Doumont v. Shenango, Inc.,* Civil Action No. 78-1367, and *Robert Milanovich v. Jones and Laughlin Steel Corporation,* Civil Action No. 78-1368, and five other class actions filed in the Western District of Pennsylvania, the District Court granted summary judgment in favor of the Defendant Plans on the basis of the Third Circuit decision in *Buczynski v. General Motors Corporation,* 616 F.2d 1238 (3d Cir. 1980). The District Court ruled that, pursuant to *Buczynski, supra,* the Steel Corporations Plans did not violate the anti-forfeiture provisions of ERISA. The individuals named above, both as named plaintiffs in the various actions, and as representatives of all others similarly situated, have a direct and immediate interest in the resolution of the issues presented upon appeal herein, in that a decision in the instant appeal will presumably be dispositive of the above described class actions.

7. In addition to the allegations that the offset provisions violate the vesting and non-forfeitability provisions of ERISA, each of the above actions have alleged that the offset of worker's compensation benefits violates the exclusive benefit provisions of Section 403(c)(1) of ERISA, which issue is not alleged in *Buczynski v. General Motors Corporation* and *Alessi v. Raybestos-Manhattan,* currently pending before this court. Thus, the issue, with respect to Section 403(c)(1) of ERISA will not be presented to the court by the parties to the instant appeal. Said issue is relevant to the disposition of the case and the legality of the offset of vested pension benefits by worker's compensation payments.

WHEREFORE the above named individuals respectfully pray that this Court grant leave to file the attached Brief as *Amici Curiae*.

Dated this 18th day of December, 1980.

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INTEREST OF AMICI CURIAE

Each of the above named individuals are participants and beneficiaries of company sponsored pension plans. The pension plans in which each of the individuals is a participant and/or beneficiary provides for the offset of workers compensation benefits against vested pension benefits. Because of the workers compensation offset provisions contained in each of the plans in which the individuals participate, they have all suffered substantial and even total losses of their vested pension benefits. Merl D. Stong and Catherine Behr are named Plaintiffs and class representatives in a class action challenging the offset provision currently pending before the United States Court of Appeals for the Seventh Circuit, Case No. 80-1755. Paul De Hate and Burnell Clough are named Plaintiffs and class representatives in a similar class action currently on appeal in the United States Court of

Appeals for the Sixth Circuit, Case No. 78-1420. Frank E. Doumont and Robert Milanovich are named Plaintiffs and class representatives in separate class actions currently on appeal in the United States Court of Appeals for the Third Circuit, Case No. 80-1857.

Because of the offset provisions in the plans, each of these individuals and the members of the class they represent, have suffered total forfeitures of their pension benefits. For example, employee Herbert Behr retired from the Bucyrus-Erie Company on February 18, 1977 after forty years of employment. At that time he was entitled to receive $314.55 per month as his pension based upon long service with the Bucyrus-Erie Company. On July 29, 1977 Mr. Behr was awarded $866.92 in workers compensation benefits based upon occupational hearing loss incurred in the course of his employment. On September 26, 1977 the Company, based upon those benefits, cut off his pension from October, 1977 to June, 1978. In the interim, on June 15, 1977 Mr. Behr was awarded $14,378.41 in workers compensation benefits by reason of his having sustained a 45% permanent partial disability resulting from an occupational lung disease he incurred as a result of his employment. On January 25, 1978, and again based upon the claimed offset provision, the Company cut off and suspended Mr. Behr's pension until November, 1982. On May 24, 1978 Mr. Behr died by reason of his disability, having never again received the pension he worked forty years to earn.

Paul De Hate retired from the Consumers Power Company with twenty-seven years of service, following knee and spinal injuries for which he received workers disability benefits. Based upon the challenged workers compensation offset provision, he lost his entire $430.00 monthly pension.

Burnell Clough retired with twenty-five years of service effective October, 1976. He currently receives $105.00 a week in workers disability benefits for massive injuries from a 46,000 volt electrocution, but his accrued vested pension of $226.00 has been wiped out by operation of the offset provision.

Each of the other individuals have similarly lost their

vested pension benefits by virtue of the operation of the offset provisions in the plans.

These individuals, on behalf of themselves and all members of the classes which they represent in the various pending litigation have direct and immediate interest in the resolution of the issues on this appeal in that a decision in this appeal would presumably be dispositive of litigation currently pending in the Circuit Courts of Appeal. *Amici* also believe that their extensive research in this area can be of considerable assistance to the Court with respect to the issues presented by the operation of the offset provisions.

In addition to the allegations that the offset provisions violate the vesting and nonforfeitability provisions of ERISA, each of the class actions which the individuals have brought have alleged that the offset of workers compensation benefits violates the exclusive benefit provisions of Section 403(c)(1) of ERISA, which issue was not alleged in *Buczynski v. General Motors Corporation* currently pending before this Court.

SUMMARY OF ARGUMENT

The parties *amici curiae* will not offer argument on each of the issues advanced by Plaintiffs-Appellants in support of their claim that an employer may not offset vested pension benefits due to an employee's workers compensation payments. *Amici* believe that the briefs submitted to this Court by Plaintiffs-Appellants, as well as the decisions of the District Courts of the Eastern District of Wisconsin in *Stong v. Bucyrus-Erie Company,* 472 F.Supp. 1088 (E.D. Wis., 1979) recon. denied 481 F.Supp. 760 (E.D. Wis., 1979) and of the Eastern District of Michigan in *Utility Workers Union v. Consumers Power Co.,* 453 F.Supp. 447 (E.D. Mich, 1978) establish beyond serious question that such offset is an impermissible forfeiture within the meaning of Section 203(a) and 2(19) of ERISA, 29 U.S.C. §1053(a) and §1002(19).

Amici also believe, however, that it is equally clear that such offset provisions violate Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1) in that the offset allows the employer to utilize plan assets to pay its own workers compensation liabilities under State law. The offset provision thus allows

the assets of the plan to inure to the benefit of the employer rather than to the employees either by reducing the Company's funding obligations to the plan, or insulating it from workers compensation liability to injured employees. *Amici* believe that ERISA is entirely consistent in its prohibition of the forfeiture of vested pension benefits and that Section 403(c)(1) of ERISA clearly and literally invalidates the offset of pension benefits by workers compensation benefits.

ARGUMENT

I.

WORKERS COMPENSATION OFFSET PROVISIONS VIOLATE *SECTION 403(c)(1) OF ERISA, 29 U.S.C. §1103(c)(1)*

A. *Offset of vested pension benefits contravenes Section 403(c)(1)'s prohibition against employer utilization of plan assets for its own direct or indirect benefit.*

Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1) provides, with certain exceptions not here pertinent, that:

> "The assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defray reasonable expenses of administering the plan."

Section 403(c)(1) of ERISA actually contains two distinct requirements. First, this Section forbids the use of any plan assets for the direct or indirect benefit or use of an employer. Second, the Section affirmatively requires that the plan assets be held and used for the sole and exclusive purpose of providing benefits to participant-employees of the plan.

The workers compensation offset provisions manifestly violate both of these mandates. In the first place, it is clear that, by virtue of the provisions, the assets of the plan accrue and inure to the benefit of the employer rather than the employees in at least two ways. First, notwithstanding the fact that the pension fund represents deferred wage compensation of employees for their labor, the employer may, in ef-

fect, pay off an unrelated debt out of this fund of employee wages. Thus, every payment the employer makes to satisfy his liability under the workers compensation law proportionately reduces the cost of paying for such pension benefits—a cost borne solely by the employer in a non-contributory plan. Thus, payment of its workers compensation liability, which the employer otherwise owes his employees, allows the Company to satisfy or reduce its funding obligations to the plan dollar-for-dollar. In the case of a retiree, the plan has been funded based upon his past years of service and the amount contributed being actuarially sufficient to pay him a pension for the rest of his life. In the event that he does obtain a subsequent workers compensation award, he receives no pension and thus there are excess funds in the plan which operate in turn to reduce the funding obligation of the same employer.

Secondly, since the offset provision reduces only the pension benefits of those employees who file a successful workers compensation claim against the Company, it strongly deters an employee from filing such a claim. The chilling effect of the offset provision on the exercise by the employees of their statutory workers compensation rights directly benefits the employer by reducing its costs and liabilities for work related injuries to their employees. The mere existence of the offset provision and the threat of its impending implementation results in a reduction of the number of claims made and makes the processing of a workers compensation claim by a retiring employee a futile and senseless act. Since the employer reduces the pension paid dollar-for-dollar, recouping the amount of workers compensation paid, the net effect to the employee asserting a workers compensation claim is that he receives not one additional penny to compensate him for his injury, but has incurred the expense and inconvenience of prevailing on his workers compensation claim. In the final analysis, the employee pays his own workers compensation out of his pension which represents deferred wages he actually earned during his years of service to the Company.

Additionally, this frustrates the public policy attempted to be furthered by the enactment of workers compensation laws. The purpose of State Workers Compensation Acts is "to provide financial and medical benefits to the victims of work connected injuries and their families—regardless of fault, and to allocate the financial burden to the most appropriate source, the employer, and ultimately the consumer of the produce." *Klein Industrial Salvage v. ILHR Department,* 80 Wis.2d 457, 462, 259 N.W.2d 124 (1977); *Brenne v. ILHR Department,* 38 Wis.2d 84, 91, 156 N.W.2d 497 (1968). Manifestly, the existence of the offset provision contained in pension plans frustrates the public policy embodied in the Workers Compensation Acts and, in the final analysis, results in the allocation of the financial burden of "work connected injuries" to the victims and their families rather than the employer as intended.

The other primary public policy underlying statutory workers compensation is that employees accept smaller recoveries than those potentially available at common law in return for coverage of all work-related injuries regardless of fault. The States have limited an employer's liability for the *quid pro quo* of an employee's sure and swift recovery of schedule payments. *Borgnis v. Falk Co.,* 147 Wis. 227, 133 N.W. 209 (1911); *Mulder v. Acme-Cleveland Corp.,* 95 Wis.2d 173, 182, 290 N.W.2d 276 (1980). The existence of the offset provision similarly frustrates this public policy since employees are forced to forego even their recovery of scheduled payments and are still left without a remedy at common law by virtue of the exclusive remedy provisions of the State Workers Compensation Act. In effect, the workers compensation offset denies the employee his statutory remedy, which by law is his exclusive remedy for work connected injuries. Thus, the operation of the provision leaves the injured employee without any remedy whatsoever.

The offset provision thus allows the assets of the plan to inure to the benefit of the employer rather than its employees either by reducing the Company's funding obligation to the plan or insulating it from workers compensation liability to

injured employees while at the same time granting an immunity to the employer from liability at common law. The inescapable fact is that the employer now uses the pension fund, which is created solely out of the deferred compensation of their employees, to avoid or negate its workers compensation liabilities to the same employees. The offset provision in effect prevents an employee from receiving full pension benefits solely because he suffers an involuntary job related injury compensable under the Workers Compensation Law unless he decides not to force his employer to satisfy its workers compensation liability. Thus the employee must choose between receiving compensation for his injury or receiving full retirement benefits which represent deferred actual wages of the employee set aside for his retirement.

B. *Workers compensation is a mere substitute and replacement of common law liability.*

A fundamental error made by Defendant-Appellees and the Secretary of the Treasury is their failure to recognize the relationship between the common law damage action and workers compensation payments under the Workers Compensation Statute. The Wisconsin Workers Compensation Act, Section 102.01, *et seq.*, Wis. Stats., was originally enacted in 1911. The Act was in derogation of the common law action for tortious negligence of a master to his servant. In *Guse v. A.O. Smith Corp.* 260 Wis. 403, 51 N.W.2d 24 (1952), quoting *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911), which held the Wisconsin Compensation Act constitutional, the Wisconsin Court stated:

> "The legislature, in response to a public sentiment which cannot be mistaken, has passed a law which attempts to solve certain very pressing problems which have arisen out of the changed industrial conditions of our time. It has endeavored by this law to provide a way by which employer and employed may . . . escape entirely from that very troublesome and economically absurd luxury known as personal injury litigation, and resort to a system by which every employee . . . may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a

> lawsuit and without friction . . . the . . .employer . . . can never be mulcted in heavy damages, and will know whenever an employee is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employee at any time and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell." 260 Wis. at 407

The Courts and the legislatures have clearly recognized that workers compensation is a substitute for, and is in lieu of the employer's common law liability to his employees. As the Wisconsin Court stated in *Guse, supra:*

> "By legislative declaration there has been grafted on the relation of employer and employee . . . certain rights and liabilities in case af accidental injury to the employee. As has been many times stated, *this is a substitute for the liability of the employer at common law . . ."* 260 Wis. at 408

Not only is the remedy afforded by the Compensation Act statutory and exclusive, but as a result of the Act, there is no common law tort liability. *Anderson v. Miller Scrap Iron Co.,* 169 Wis. 106, 170 N.W. 275 (1919).

Thus it is clear that the workers compensation liability and remedy is in lieu of the employer's liability and the employee's remedy at common law. Workers compensation is nothing more than a substitute and replacement for the common law action between master and servant, the only distinction being that traditional common law defenses are made unavailable to the employer in return for which employees "accept smaller recoveries than those potentially available at common law." *Coleman v. American Universal Insurance Co.,* 86 Wis.2d 615, 621, 273 N.W.2d 202 (1979).

The fact that statutory workers compensation represents a mere substitute and replacement of the common law damage action is further reflected in the language utilized in the original statute in the State of Wisconsin, Chapter 50, Laws of 1911. The original statute, in Section 2394-4 Stats. (1911) provided:

> "Liability for the compensation hereinafter provided for, *in lieu of any other liability whatsoever,* shall exist against an employer for any *personal injury* accidentally sustained by his employee or for his death . . ." (Emphasis supplied)

Clearly, this represented a substitution of the statutory remedy of workers compensation for the personal injury liability of an employer at common law.

This relationship between workers compensation and common tort actions is also recognized by the New Jersey Supreme Court in *Renshaw v. United States Pipe and Foundry Co.* 30 N.J. 458, 153 A.2d 673 (1959). The New Jersey Supreme Court stated:

> "Liability for workers' compensation, or the extent thereof, is not based on the impairment of loss of earning power, rather the loss ensuing from personal injury as it detracts from the former efficiency of the workmen's body or its members in the ordinary pursuits of life." 30 N.J. at 465

Unlike the Defendant-Appellees and the Third Circuit below, the District Courts in *Stong v. Bucyrus-Erie Company,* 472 F.Supp. 1088 (E.D. Wis., 1979), recon. denied 481 F.Supp. 760 (E.D. Wis., 1979), currently before the United States Court of Appeals for the Seventh Circuit, No. 80-1755 and *Utility Workers Union v. Consumers Power Co.,* 453 F.Supp. 447 (E.D. Mich., 1978), currently before the United States Court of Appeals for the Sixth Circuit, No. 78-1402 recognized the relationship between workers compensation and traditional tort remedies at common law. In *Stong v. Bucyrus-Erie Co., supra,* the Court stated:

> "Workers' compensation benefits are intended to compensate an employee for suffering a work-related injury and are not intended to supply retirement security . . . A covered employee loses his right to sue his employer in tort and has significant limits placed upon the amount he can recover in exchange for an almost assured recovery . . . It would be an unreasonable interpretation of ERISA . . . to conclude that Congress injected another trade-off into this intricate scheme, forcing an employee with work related injuries to forego relief provided by statute for such injury in order to preserve his retirement benefits." 472 F.Supp at 1094.

Furthermore, in *Utility Workers Union v. Consumers Power Co., supra,* Judge Pratt determined that:

> "Workmen's compensation is a comprehensive *replacement* for traditional tort remedies and their attendant common law defenses . . . This system has

compensatory elements beyond mere wage replacement . . ." 453 F.Supp at 455

The Defendant-Appellees and the Secretary of the Treasury, as well as the Third Circuit below, have not recognized the fact that workers compensation represents a mere statutory substitute for the employer's liability at common law. The Defendant-Appellees' and the Secretary's entire arguments with respect to Treasury Regulations and Revenue Rulings ultimately come back to and hinge upon Revenue Ruling 68-243, C.B. 1968-1, 157, 158. In that Revenue Ruling, the Internal Revenue Service stated:

"Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and *offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.*" (Emphasis supplied)

This Revenue Ruling goes on to approve the offset of workers compensation benefits, while at the same time disapproving the offset of damages recovered by an employee in a common law action because such an offset "would result in the plan being used to satisfy the employer's liability for damages." Rev. Rul. 68-243, *supra.*

As is demonstrated above, there is no logical distinction between common law liability of an employer to his employees and the statutory liability of the employer, which is merely in lieu and substitution of that common law liability, which would justify a different treatment with respect to the offset of the same as against vested retirement benefits. Clearly, workers compensation benefits are in lieu of the employer's liability for damages at common law. Precisely because workers compensation benefits are nothing more than a limited statutory substitute for the employer's liability at common law, offsetting retirement benefits by workers compensation would likewise "result in the plan being used to satisfy the employer's liability for damages." Rev. Rul. 68-243, *supra.*

Because the offset of workers compensation benefits results in the plan being used to satisfy the employer's

statutory liability for damages, it clearly runs afoul of Section 403(c)(1) of ERISA in that the assets of the plan are used to benefit the employer and not for the exclusive purpose of providing retirement benefits to the participant-employees. There is absolutely no rational reason to allow an offset of the workers compensation remedy for work-connected injuries and to prohibit the offset with respect to the common law remedy which, for all practical purposes, no longer exists. The inescapable fact is that the assets of the plan are being used to satisfy the statutory liability which is in lieu and substitution of liability at common law.

Clearly, even the Internal Revenue Service and its Secretary would find, based upon Revenue Ruling 68-243, that an offset provision in a pension plan offsetting common law damages would violate the "exclusive benefit" provision contained in Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1). It necessarily follows, in light of the true nature of workers compensation and its relation to the employer's common law liability, that the offset of workers compensation benefits likewise violates the "exclusive benefit" provisions of Section 403(c)(1) of ERISA.

In the final analysis, the fundamental error made by Defendant-Appellees and the Secretary of the Treasury, both with respect to vesting under Section 203 of ERISA as well as the "exclusive benefit" provision under Section 403 of ERISA, is a basic failure to understand or appreciate the actual nature and purpose of workers compensation benefits.[1] There can be no serious question but that if the

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[1] It is interesting to note that in the statement of Daniel R. Halperin, Acting Deputy Assistant Secretary (Tax Legislation) before the Subcommittee on Labor of the Senate Human Resources Committee, Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Senate Finance Committee, August 15, 1978, the Secretary, commenting on proposed changes in ERISA, stated:

> "To the extent workers' compensation benefits are not designed as wage replacements, they should not therefore be permitted to offset retirement benefits . . . to the extent the offset workers' compensation is a disincentive to providing a minimum benefit, which is likely, the Treasury Department supports elimination of, or revision of, the offset. *Based on our limited knowledge of workers' compensation,* we support this provision . . ."

offsetting of retirement benefits by common law damages results in the assets of the plan being utilized to satisfy the employer's liability, that a provision offsetting the benefits which were substituted for and in lieu of those common law damages also results in the assets of the plan being utilized to satisfy the employer's liability. The fact that the actual damages are statutory and liquidated, rather than common law and unliquidated does not change the effect of offsetting retirement benefits—the plan is "being used to satisfy the employer's liability for damages" in violation of Section 403(c)(1) of ERISA.

C. *The operation of the offset provision results in a denial of pension benefits which is unlawfully arbitrary and exclusionary.*

The concept and interpretation of "exclusive benefit" under ERISA is derived from earlier decisions under the parallel mandate of Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5). Specifically, Section 302 of the Labor Management Relations Act requires that a pension trust be "established for the sole and exclusive benefit of the employees." *Lee v. Nesbitt,* 453 F.2d 1309 (9th Cir., 1972). In *Burroughs v. Pension Trust Fund for Operating Engineers,* 542 F.2d 1128 (9th Cir., 1976) a case decided under Section 302 of LMRA, the Court held that:

> "Whether the unjust exclusion of pensioner is obtained from the exclusive provisions of the trust fund itself, or from the arbitrary and exclusionary implementation procedures of the trustees, the ultimate effect is that the trustee is not operating for the 'sole and exclusive benefit of the employees.' "

In accord with this reasoning, the Court in *Lee v. Nesbitt, supra,* determined that the plan owes a fiduciary duty to employees and may never impose unreasonable conditions in determining benefit allocations. Clearly, the workers compensation offset provision on its face and, as applied, is unlawfully arbitrary and exclusionary and under the foregoing principles, not for the exclusive purpose of providing benefits to plan participants and their beneficiaries. The denial of pension benefits based on the offset provision is completely arbitrary. It totally excludes a deserving

employee, who has met all of the minimum requirements, who has worked all his life for the company but who happens to suffer the misfortune of a work related injury and enforces his limited right to compensation under State law, from receiving his retirement benefits. At the same time, it pays full retirement benefits to an employee who works only ten credited years for the Company, but who does not suffer a happenstance of a work related injury. The only true distinction between the employees is that one suffers a disabling injury which burdens and diminishes the enjoyment of life, and yet it is this disabled individual, rather than the healthy retiree, who forfeits and loses his retirement benefit. Such a provision is unlawfully irrational and arbitrary under the foregoing principles.

The internal arbitrary nature of the offset, as approved in Revenue Ruling 68-243, is apparent upon examination of the various differences in workers compensation throughout the United States. State compensation laws are compulsory or elective. Under an elective law, the employer or employee may accept or reject the Act. Where an employee rejects the State Act, he may sue the employer at common law. While most jurisdictions provide for compulsory coverage under workers compensation laws, coverage is still elective in three States.[2]

Application of the offset provision and Revenue Ruling 68-243 to elective compensation States demonstrates the arbitrary and capricious nature of the offset. In those States where coverage is not compulsory, or where the employee is employed by an employer of fewer than the compulsory number of employees, the employee may sue the employer at common law for damages, bypassing the Workers Compensation Act. Assuming that the employee bypassing the Workers Compensation Act obtains a judgment against his

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[2] Coverage is elective in South Carolina, New Jersey and Texas. In addition, eleven States provide for numerical exemptions of employees from Workers Compensation Acts. *Analysis of Workers' Compensation Laws*, 1980 Edition, Chamber of Commerce of the United States, Library of Congress No. 60-36379, P. VIII.

employer for his work related injury, that same employee, although his damages were unlimited at common law, does not suffer an offset of his retirement benefits by virtue of Revenue Ruling 68-243. Thus, not only is that employee entitled to damages without limitation, but also the greater damages obtained are not subject to offset by his retirement benefits. The net result is that the employee obtains a larger recovery without being subjected to the offset.

Under precisely the same circumstances, an employee in a compulsory workers compensation State has his damages for the same injuries severely limited by the Compensation Act and whatever benefits he does receive are simply deducted, offset and forfeited as against his vested retirement benefits. Thus there can be no serious question but that the operation of the offset provision and Revenue Ruling 68-243 is arbitrary and capricious and not for the exclusive purpose of providing benefits to plan participants and their beneficiaries.

CONCLUSION

Based on the foregoing, there can be little serious question but that the offset and forfeiture of vested pension benefits by workers compensation benefits not only violate the vesting and nonforfeitability provisions of Section 203(a) and Section 2(19) of ERISA, but also violate Section 403(c)(1) of ERISA. It is clear that throughout ERISA Congress consistently intended to preserve to the retirees and participants of the plan their pension benefits and to eliminate all provisions contained in pension plans which would take away those vested pension benefits. For all the reasons set forth above, *Amici* pray that the decision below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28, the undersigned hereby certifies that on December 18, 1980 three copies of the foregoing Motion For Leave to File Brief as Amici Curiae and Brief of Amici Curiae were served by depositing the same in the United States Mail with first class postage prepaid, addressed to counsel of record at their post office addresses as follows:

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